ORIGINAL

Supreme Court, U.S.
FILED
MAY 24 2000
CLERK

NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RECEIVED
MAY 26 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

VIRGINIA LAUGHLIN SCHLUETER
Federal Public Defender

ROBERT F. BARNARD
Assistant Federal Public Defender
501 Magazine Street, Room 318
New Orleans, Louisiana 70130
Telephone: (504) 589-7930
LSBA NO. 2760

May, 2000

NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

The general question presented by this case is whether the Constitution prohibits the prolonged indefinite detention of an immigrant after entry of a final order of deportation when deportation cannot be effectuated. The three subsidiary constitutional questions are:

I.

Whether the circuit court erred in ruling that "resident aliens," like "excludable aliens," can be indefinitely detained.

II.

Whether the circuit court improperly invoked the "plenary power doctrine" absent a question of national sovereignty or foreign relations.

III.

Whether the circuit court failed to recognize the fundamental nature of petitioner's liberty interest to be free from physical restraint.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

ARGUMENT 2

CONCLUSION 10

CERTIFICATE 11

TABLE OF AUTHORITIES

CASES

Caranica v. Nagel, 28 F.2d 955 (9th Cir. 1928) 7

Carter v. Derwinski, 987 F.2d 611 (9th Cir. 1993) (en banc) . . 10

Caspari v. Bohlen, 510 U.S. 383 (1994) 4

Castillo-Gradis v. Turnage, 752 F. Supp. 937 (S.D. Cal. 1990) . . 8

Johns v. Dep't of Justice, 653 F.2d 884 (5th Cir. 1981) 8

Ma v. Reno, 208 F.2d 815 (9th Cir. 2000) 2-4

Oguachuba v. INS, 706 F.2d 93 (2d Cir. 1983) 8

Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) 3

Petition of Brooks, 5 F.2d 238 (D. Mass. 1925) 7

Saksagansky v. Weedin, 53 F.2d 13 (9th Cir. 1931) 7

Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944) . . 4

United States ex rel. Ross v. Wallis, 279 F. 401 (2d Cir. 1922) . 7

United States v. Locke, 471 U.S. 84 (1985) 3

United States v. Price, 361 U.S. 304 (1960) 9

Wolck v. Weedin, 58 F.2d 928 (9th Cir. 1932) 7

Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) 4

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) . 3

STATUTES

Title 8, United States Code, Section 1231(a)(6) 2, 4, 9

Title 8, United States Code, Section 1252, et seq. . . . 4, 7, 8

OTHER AUTHORITIES

H.R. Rep. No 1192, 81st Cong., 1st Sess. 6 (1949) 7

Illegal Immigration Reform and Immigrant Responsibility Act, Section 303, et seq. 4, 6, 9

Immigration Act of 1917, Section 20, 39 Stat. 890-891 (1917) . . . 7

Immigration Act of 1917, Section 21, 39 Stat. 890-891 (1917) . . . 7

Immigration Act of 1990, Section 504, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) 8

Immigration and Naturalization Act, Section 241, et seq. 2, 4-6, 9

Immigration and Naturalization Act, Section 242, et seq. . 6, 8, 9

Supreme Court Rule 15.6 1

NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now comes petitioner Kestutis Zadvydas, through undersigned counsel, and pursuant to Supreme Court Rule 15.6, hereby files the following Reply Brief in support of his Petition for Writ of Certiorari, which was filed on January 11, 2000. Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals filed August 11, 1999, as to which rehearing was denied on October 13, 1999.

ARGUMENT

In its Brief in Opposition, the government contends there is no conflict between the Ninth Circuit's decision in **Ma v. Reno**, 208 F.2d 815 (9th Cir. 2000) and the instant matter and, therefore, no reason to grant certiorari to resolve the two apparently disparate opinions.[1] Respondent acknowledges that the case decided by the Ninth Circuit is similar. However, because the Ninth Circuit granted habeas relief based on statutory grounds and the Fifth Circuit decided this case on constitutional grounds, the government concludes there is no conflict between the two circuits. The government also asserts that since the statutory argument was not addressed by the Fifth Circuit and was not included in the original petition or supplemental petition, that this case would be an inappropriate "vehicle" to consider the argument accepted in **Ma**.

Contrary to respondent's contention, this statutory question is properly before the Court. First, this same argument was raised and litigated in the Court of Appeals. At oral argument, the Fifth Circuit Court of Appeals requested the parties file supplemental briefs. Zadvydas accordingly filed a supplemental brief arguing that the new statute, Title 8, United States Code, 1231(a)(6), (INA 241(a)), lacked the mandatory detention language contained in the prior statutes.

[1]See Brief in Opposition, pp.15-19.

Zadvydas further contended (as ultimately was held in **Ma**) that "federal courts consistently read a 'reasonable time' limitation into the government's authority to detain a deportable alien..." and urged the Court of Appeals to do so in this case.[2] Petitioner also pointed out in his Supplemental Brief filed at the Fifth Circuit Court of Appeals that finding a "reasonable time" limitation to be part of the statute avoids the danger of needlessly resolving constitutional issues.[3] See **Ohio v. Akron Center for Reproductive Health**, 497 U.S. 502, 514 (1990).

This Court has held that review before it brings not just the constitutional questions decided below, but the entire case. See, e.g., **Zobrest v. Catalina Foothills School District**, 509 U.S. 1, 7 (1993) (litigants failed to urge any statutory grounds before the Court of Appeals), quoting, **United States v. Locke**, 471 U.S. 84, 92 (1985). Where non-constitutional issues are raised before the Court of Appeals, those issues can be considered by this Court even though not specifically noted in the petition for certiorari. Federal courts should avoid constitutional questions if another ground is available upon which to decide a case. **Zobrest** 509 U.S. at 7-8. Moreover,

[2]Petitioner-Appellee's Fifth Circuit Supplemental Brief, p.10-17 (See attached). A copy of petitioner-appellee's entire Fifth Circuit Supplemental Brief has been lodged with the Clerk of the United States Supreme Court.

[3]Petitioner-Appellee's Fifth Circuit Supplemental Brief, p.10-17 (see attached).

courts should first consider non-constitutional issues before reaching constitutional questions. See, e.g., **Spector Motor Service, Inc. v. McLaughlin**, 323 U.S. 101, 105 (1944). Because of this avoidance doctrine, the statutory issue here is a necessary predicate to the resolution of the questions presented in the petition. As such, the statutory question resolved in **Ma** is fairly included in the claims set out in Mr. Zadvydas' original petition. See **Caspari v. Bohlen**, 510 U.S. 383, 389-90 (1994). As a result, this Court can and should address the statutory question.

To briefly elaborate on the statutory issue, petitioner was released into the custody of the Immigration and Naturalization Services (INS) in 1994. As noted by the Fifth Circuit, "a flurry of statutory changes have taken place" since then. **Zadvydas v. Underdown**, 185 F.3d 279, 286 (5th Cir. 1999). During that time, detention was governed by Title 8, United States Code, Section 1252 and the Transition Period Custody Rules (TPCR) authorized by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). These two statutes place the burden to prove that he is not a danger to the community or a flight risk before being released on the detainee awaiting deportation. The most recent provision of IIRIRA authorizes detention, but makes it discretionary after ninety days. IIRIRA, Section 305(c), codified as Title 8, United States Code, Section 1231(a)(6), Immigration and Nationalization Act (INA), Section

241(a)(6). Because of this change, INA §241(a) actually provides less authority for petitioner's continued indefinite detention than the prior statutory regime at issue before the district court.

More specifically, under the new statute the Attorney General is required to expel an alien ordered removed within a ninety (90) day "removal period." INA §241(a)(1). During the removal period, the Attorney General "[u]nder no circumstances" shall release an alien who is removable on the basis of prior criminal convictions or terrorist activity. INA §241(a)(2). Following the removal period, detention is governed by two provisions. INA §241(a)(6) provides that "[a]n alien ordered removed [on criminal grounds] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period..." (emphasis added). Another provision, INA §241(a)(3), requires INS supervision of any person released after the removal period.

Notably, neither section authorizes indefinite detention of an alien who the government is unable to remove. As previously noted, if the statute were read to authorize such detention, it would raise serious constitutional questions.

This result is also in accord with the statutory history. Section 241(a) differs from the prior detention scheme in two critical respects. First, when amending the INA, Congress shortened the time

period in which the INS is required to effectuate an order of removal, from the six months formerly provided to 90 days. Compare INA §242(a)(2)(C) ("the Attorney General shall have a period of six months from the date of such order") with INA §241(a)(1) ("the Attorney General shall remove the alien from the United States within a period of 90 days"). Moreover, INA §241(a) lacks the mandatory detention language in prior statutes. Both INA §242(a)(2) and the Temporary Period Custody Rules (TPCR) prohibited the INS from releasing criminal aliens who were unable to demonstrate that they posed neither a danger or flight risk. See INA §242(a)(2)(B)(1995) ("The Attorney General may not release an alien from custody....either before or after a finding of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that [he] is not a threat to the community and that [he] is likely to appear before any scheduled hearings."); IIRIRA §303(b)(3)(B) ("The Attorney General may release the alien only if the alien . . . satisfies the Attorney General that the alien will not pose a danger to the safety of persons or of property and is likely to appear for any scheduled proceeding."). In contrast, INA §241(a)(6), as amended by IIRIRA, merely authorizes continued detention for an unspecified period of time beyond the 90-day removal period.

The "absence of a time limit on detention" following entry of a deportation order has never been viewed as authorizing the INS to detain a deportable alien indefinitely. Prior to 1950, the immigration

statute did not contain any specific time limit for detention pending deportation. Immigration Act of 1917, §§20, 21, 39 Stat. 890-891 (1917) (requiring that deportable aliens be "taken into custody and deported, subject to release on bond pending disposal of the case"). Nonetheless, the federal courts consistently read a "reasonable time" limitation into the government's authority to detain a deportable alien pursuant to this statute, generally interpreted to be no longer than four months. See **Wolck v. Weedin**, 58 F.2d 928, 931 (9th Cir. 1932); **Saksagansky v. Weedin**, 53 F.2d 13, 16 (9th Cir. 1931); **Caranica v. Nagel**, 28 F.2d 955, 957 (9th Cir. 1928); **Petition of Brooks**, 5 F.2d 238 (D. Mass. 1925); **United States ex rel. Ross v. Wallis**, 279 F. 401, 404 (2d Cir. 1922).

In 1950, Congress enacted a statute which placed a six-month limit on detention following a deportation order. Congress viewed this amendment as a grant of new power. See H.R. Rep. No 1192, 81st Cong., 1st Sess. 6 (1949) ("Existing law does not grant the Attorney General any specified period of time within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad."). Such a view of this provision makes sense in light of the fact that it gave the Attorney General more time to effectuate the deportation than had previously been authorized under the cases cited above. Nonetheless, this detention provision still permitted only six months of detention following a final order of deportation. Following

the end of the six-month period, "the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section" Title 8, United States Code, Section 1252(c) (repealed 1996) (emphasis added). Section 1252, however, did not authorize any further detention beyond the reasonable deportation period. Thus, courts held that "the six month limit on detention . . . was absolute and any detention beyond that time was unlawful." **Oquachuba v. INS**, 706 F.2d 93, 96 (2d Cir. 1983) (summarizing district court ruling); see **Johns v. Dep't of Justice**, 653 F.2d 884, 890 (5th Cir. 1981) (finding that after the six month period expires "detention is not permitted"); **Castillo-Gradis v. Turnage**, 752 F. Supp. 937, 941 (S.D. Cal. 1990) ("Once the six months has expired, the alien must be released and put under supervision until the INS is ready to execute his deportation."). This six-month limit on post-deportation order of detention remained in effect until 1990, when Congress amended the provision to bar release of aggravated felons with final orders of deportation. Immigration Act of 1990, Section 504, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).[4] The Antiterrorism and Effective Death

---

[3]Specifically, this amendment stated that "[n]otwithstanding . . . subsections (c) [the six-month rule]" the Attorney General could not release a lawfully admitted alien who had been convicted of an aggravated felony unless the alien could demonstrate a lack of danger and flight risk. INA §242(a)(2)(A) & (B), Title 8, United States Code, Sections 1252(a)(2)(A) & (B) (repealed 1996). The following year, Congress further amended INA §242(a)(2)(B) to

Penalty Act of 1996 made minor changes to the wording of old INA §242(a)(2)(A). More significantly, it repealed INA §242(a)(2)(B), which had permitted the Attorney General to release an aggravated felon from detention upon a showing that the alien was not a danger or flight risk. Section 440(c), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). For a short period of time the INS actually had no discretion to release any aggravated felon from detention.

Congress later amended the detention provisions of the INA by passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA). This law repealed the detention provisions of INA §242(a) and created new detention provisions concerning aliens with final orders of removal at INA §241(a), Title 8, United States Code, Section 1231(a), described above. Lacking explicit statutory authority for indefinite detention of deportable aliens, the government can only argue that the INA implicitly permits indefinite detention. However, when the intent of Congress cannot be clearly discerned and there are several possible explanations for its inaction, that inaction is not a sufficient basis from which to imply statutory authority. **United States v. Price**, 361

---

make more explicit that the limitation upon release from detention applied to aggravated felons "either before or after a determination of deportability." Section 306(a)(4), Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991).

U.S. 304, 310-11 (1960) ("[N]onaction by Congress affords the most dubious foundation for drawing positive inferences."). Nor can the courts supply interpretations that enforce policy choices not made by Congress, particularly when such choices would compromise such basic rights as personal liberty. **Carter v. Derwinski**, 987 F.2d 611, 615 (9th Cir. 1993) (en banc) (We may insist on a clear statement of congressional intent before interpreting a statute in a way that compromises especially weighty values.").

CONCLUSION

For the reasons set forth above, and the reasons set forth in petitioner Zadvydas' original Petition for Writ of Certiorari, and Supplemental Brief in Support of Petition, this Court should grant certiorari and reverse the judgment of the Fifth Circuit.

Respectfully submitted this 24th day of May, 2000.

VIRGINIA LAUGHLIN SCHLUETER
Federal Public Defender

ROBERT F. BARNARD
Assistant Federal Public Defender
501 Magazine Street, Suite 318
New Orleans, Louisiana 70130
Telephone: (504) 589-7930
LSBA No. 2760

CERTIFICATE

I hereby certify that a copy of the foregoing notice to continue stay of mandate has been served on the following counsel, at the following addresses, by placing same in the United States mail, postage prepaid, this 24th day of May, 2000.

Mr. Seth P. Waxman
Solicitor General of the U.S.
Department of Justice
Tenth & Pennsylvania Ave.,N.W.
Room 5143
Washington, D.C. 20530

Ms. Mary A. Kenney
Lawyers' Committee for Civil Rights
Under Law of Texas
Immigrant and Refugee Rights Project
2311 N. Flores
San Antonio, TX 78212

Mr. David W. Ogden,
Mr. David M. McConnell and
Ms. Beth Brinkman
Office of Immigration Litigation,
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Mr. Donald Kerwin
Catholic Legal Immigration Network
Theological College
401 Michigan Avenue, N.E.
Washington, D.C. 20017

Ms. Judy Rabinovitz
American Civil Liberties Union
Immigrant Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Ms. Kari Converse
122 Tulane Drive, S.E.
Albuquerque, NM 87106

Mr. Paul L. Hoffman
723 Ocean Front Walk
Venice, CA 90291

Mr. Marc Robert
202 Central Avenue, S.E.
Albuquerque, NM 87102

ROBERT F. BARNARD
Assistant Federal Public Defender

NO. 99-7791

IN THE

SUPREME COURT OF THE UNITED STATES

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A P P E N D I X

1. Pages 10-17 of the *Supplemental Brief for the Petitioner-Appellee Kestutis Zadvydas* filed with the Fifth Circuit Court of Appeals

alien's removal, detention is governed by two provisions. INA §241(a)(6) provides that "[a]n alien ordered removed [on criminal grounds] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period..." (emphasis added). Another provision, INA §241(a)(3), requires INS supervision of any person released after the Removal Period, including requirements that the alien periodically appear before an immigration officer, submit to necessary medical and psychiatric exams, give certain information under oath, and obey reasonable restrictions on conduct or activities.

Notably, neither of these sections authorizes indefinite detention of an alien who the government is unable to remove. Indeed, if the statute were read to authorize such detention, it would raise serious constitutional questions.[4] Rather than reaching the substantial constitutional issues in this case, the Court should find that Mr. Zadvydas' detention violates the INA because the Act does not authorize indefinite detention. See Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 514

[4]As set forth in prior briefing by both petitioner and amici, indefinite detention of a deportable alien whose removal cannot be effectuated violates due process. See Pet.'s Br. at 17-39; Brief of Amicus Curiae ACLU and Texas Lawyers Committee at 4-14.

(1990) (wherever possible, courts should construe statutes in a manner that avoids the danger of unconstitutionality).

This result is also in accord with the statutory history. Section 241(a) differs from the prior detention scheme in two critical respects. First, when amending the INA, Congress shortened the time period in which INS is required to effectuate an order of removal, from the six months formerly provided to 90 days. Compare INA §242(a)(2)(C) ("the Attorney General shall have a period of six months from the date of such order") with INA §241(a)(1) ("the Attorney General shall remove the alien from the United States within a period of 90 days"). Even more significantly, INA §241(a) lacks the mandatory detention language in prior statutes -- both INA §242(a)(2) and the TPCR -- which prohibited the INS from releasing criminal aliens who were unable to demonstrate that they posed neither a danger or flight risk. See INA §242(a)(2)(B)(1995) ("The Attorney General may not release from custody....either before or after a finding of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."); IIRIRA §303(b)(3)(B) ("The Attorney General may release the alien only if the alien . . . satisfies the Attorney General that the

alien will not pose a danger to the safety of persons or of property and is likely to appear for any scheduled proceeding."). In contrast, INA §241(a)(6), as amended by IIRIRA, merely authorizes continued detention for an unspecified period of time beyond the 90-day removal period.

Indeed, in finding that the prior statutory scheme authorized petitioner's indefinite detention, the district court expressly relied upon both the "mandatory language" of §242(a)(2) and "the absence of a time limit on detention." Zadvydas v. Caplinger, 986 F. Supp. 1011, 1025 (E.D. La. 1997); see also Barrera-Echavarria v. Rison, 44 F.3d 1441, 1446 (9th Cir. 1995) (holding that the INA expressly authorized indefinite detention of excludable aliens because the statute required detention of excludable aliens); Gisbert v. Attorney General, 988 F.2d 1437, 1445-46 (5th Cir. 1993) (noting that statute limits authority to release); Alvarez-Mendez v. Stock, 941 F.2d 956, 960-61 (9th Cir. 1991). With such mandatory language now repealed, the Attorney General's statutory authority to indefinitely detain immigrants has been undermined.

Moreover, the "absence of a time limit on detention" following entry of a deportation order has never been viewed as

authorizing the INS to detain a deportable alien indefinitely.[5] Indeed, prior to 1950, the immigration statute did not contain any specific time limit for detention pending deportation. Immigration

---

[5]This Court's decision in **Gisbert** does not compel a different result. **Gisbert** involved both a different statute and aliens who had never been admitted to the country. Petitioners, a group of Mariel Cubans, argued that their detention violated the INA because at that time no statutory provision expressly authorized the detention of excludable aliens after a final order had issued, although the INA did expressly provide for such detention of deportable immigrants. This Court rejected that argument, finding implicit authority to detain because the statute was written as a limit on the Attorney General's authority to release aliens, rather than as a limitation on the power to detain excludable individuals. **Gisbert**, 988 F.2d at 1446. As for the duration of such custody, the Court compared the provision concerning excludables, which lacked any time limit, with that governing deportables, which limited custody to six months after a final order was issued. This Court determined that difference to be significant because it indicated that "Congress intended to authorize more stringent restrictions on the freedom of excluded aliens than those imposed on resident aliens." **Id**. at 1446 n.17. Clearly, a different conclusion must be drawn when a detention statute governing deportable aliens is silent as to the duration of such detention, because courts traditionally have imposed a reasonable duration requirement upon the post-final order detention of admitted aliens. **See** pages 14-15, **infra**.

Finally, the **Gisbert** court was concerned "that to allow the Attorney General to detain deportable aliens, without providing the same authority regarding excludable aliens . . . 'would be contrary to accepted tenets of U.S. immigration law, which treat aliens subject to deportation more favorably than those seeking initial admission.'" **Id**. at 1445 (quoting **Alvarez-Mendez v. Stock**, 941 F.2d 956, 961-62 (9th Cir. 1991)). This concern was understandable, given that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after any entry." **Leng May Ma v. Barber**, 357 U.S. 185, 187 (1958).

Act of 1917, §§20, 21, 39 Stat. 890-891 (1917) (requiring that deportable aliens be "taken into custody and deported, subject to release on bond pending disposal of the case"). Nonetheless, the federal courts consistently read a "reasonable time" limitation into the government's authority to detain a deportable alien pursuant to this statute, generally interpreted to be no longer than four months. **See** **Wolck v. Weedin**, 58 F.2d 928, 931 (9th Cir. 1932); **Saksagansky v. Weedin**, 53 F.2d 13, 16 (9th Cir. 1931); **Caranica v. Nagel**, 28 F.2d 955, 957 (9th Cir. 1928); **Petition of Brooks**, 5 F.2d 238 (D. Mass. 1925); **United States ex rel. Ross v. Wallis**, 279 F. 401, 404 (2d Cir. 1922).

It wasn't until 1950 that Congress enacted a statute which placed a six-month limit on detention following a deportation order. Congress viewed this amendment as a grant of new power. **See** H.R. Rep. No 1192, 81st Cong., 1st Sess. 6 (1949) ("Existing law does not grant the Attorney General any specified period of time within which he may hold deportable aliens in custody or under control while he negotiates for their return abroad."). Such a view of this provision makes sense in light of the fact that it gave the Attorney General **more** time to effectuate the deportation

than had previously been authorized under the cases cited above.[6] This six-month limit on post-deportation order detention remained in effect until 1990, when Congress amended the provision to bar release of aggravated felons with final orders of deportation. Section 504, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).[7] The Antiterrorism and Effective Death

---

[6] Nonetheless, this detention provision still permitted only six months of detention following a final order of deportation. Following the end of the six-month period, "the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section," 8 U.S.C. §1252(c) (repealed 1996) (emphasis added). Section 1252, however, did not authorize any further detention beyond the reasonable deportation period. Thus, even if an alien created a "laundry list of . . . misdeeds," courts held that "the six month limit on detention . . . was absolute and any detention beyond that time was unlawful." Oguachuba v. INS, 706 F.2d 93, 96 (2d Cir. 1983) (summarizing district court ruling); see Johns v. Dep't of Justice, 653 F.2d 884, 890 (5th Cir. 1981) (finding that after the six month period expires "detention is not permitted"); Castillo-Gradis v. Turnage, 752 F. Supp. 937, 941 (S.D. Cal. 1990) ("Once the six months has expired, the alien must be released and put under supervision until the INS is ready to execute his deportation.").

[7] Specifically, this amendment stated that "[n]otwithstanding . . . subsections (c) [the six-month rule]" the Attorney General could not release a lawfully admitted alien who had been convicted of an aggravated felony unless the alien could demonstrate a lack of danger and flight risk. INA §242(a)(2)(A) & (B), 8 U.S.C. §1252(a)(2)(A) & (B) (repealed 1996). The following year, Congress further amended §242(a)(2)(B) to make more explicit that the limitation upon release from detention applied to aggravated felons "either before or after a determination of deportability." Section 306(a)(4), Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991).

Penalty Act of 1996 made minor changes to the wording of old INA §242(a)(2)(A). More significantly, it repealed INA §242(a)(2)(B), which had permitted the Attorney General to release an aggravated felon from detention upon a showing that the alien was not a danger or flight risk. Section 440(c), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Thus, for a short period of time, the INS actually had no discretion to release any aggravated felon from detention, either before or after a final order.

Soon thereafter, Congress significantly amended the detention provisions of the INA by passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 (IIRIRA). This law repealed the detention provisions of INA §242(a) and created new detention provisions concerning aliens with final orders of removal at INA §241(a), 8 U.S.C. §1231(a), described above. As already noted, INA §241 differs in two significant respects from the prior detention statute -- shortening the removal period from six months to 90 days, and eliminating the language that mandated detention of criminal aliens whose release could not be effectuated within this time. These changes indicate that Congress intended to move away

from prolonged indefinite detention of immigrants after removal proceedings.[8]

III.

INS Has Authority To Review Petitioner's Custody Status Even Though He Is Not Currently Detained.

The government concedes that INS has discretion pursuant to §241(a)(6) and the agency's implementing regulations to review the custody status of aliens with final orders of deportation and to order their release under conditions if they are neither a danger or flight risk. Gov't Supp. Br. at 10-14 (citing 8 C.F.R. §§241.4, 236.1(d)(2)(ii), and 236.1(d)(3)(iii)). Nonetheless, the

---

[8] Faced with this lack of explicit statutory authority for indefinite detention of deportable aliens, the government can only argue that the INA implicitly permits Mr. Zadvydas' indefinite detention. However, to read the relevant statutory provisions in this way would violate the principle of statutory construction that mandates that when the intent of Congress cannot be clearly discerned and there are several possible explanations for its inaction, that inaction is not a sufficient basis from which to imply statutory authority. United States v. Price, 361 U.S. 304, 310-11 (1960) ("[N]onaction by Congress affords the most dubious foundation for drawing positive inferences."). Nor can the courts supply interpretations that enforce policy choices not made by Congress, particularly when such choices would compromise such basic rights as personal liberty. Carter v. Derwinski, 987 F.2d 611, 615 (9th Cir. 1993) (en banc) ("We are not free to pick and choose among statutory or administrative provisions in order to achieve a result we deem fair or sensible. . . . We may insist on a clear statement of congressional intent before interpreting a statute in a way that compromises especially weighty values.").